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No. 87-1156

In the Supreme Court of the United States

OCTOBER TERM, 1987

WERNER ERNST GREGG AND ROSWITHA L. GREGG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

18 pp

QUESTIONS PRESENTED

1. Whether a warrantless search of petitioners' trash violated their Fourth Amendment rights.

2. Whether the warrants authorizing the interception of telex transmissions to and from petitioners' business and the search of petitioners' home and business satisfied the particularity requirement of the Fourth Amendment.

3. Whether the district court properly barred petitioner Werner Gregg from introducing into evidence at his trial copies of the statutes and regulations under which he was convicted and expert testimony about the meaning of those statutes and regulations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 829 F.2d 1430. The opinion of the district court denying petitioners' motion to suppress evidence (Pet. App. A22-A42) is reported at 629 F. Supp. 958.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1987. A petition for rehearing was denied on October 30, 1987 (Pet. App. A43). On December 21, 1987, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including January 8, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner Werner

Gregg was convicted on four counts of exporting items on the United States Munitions List without a license from the State Department, in violation of the Arms Export Control Act, 22 U.S.C. 2778 (Counts 1-4);[1] one count of exporting an item subject to the Export Administration Act of 1979 without a license from the Commerce Department, in violation of 50 U.S.C. App. 2410 (Count 7);[2] and two counts of making a false statement on a matter within the jurisdiction of an agency of the United States government, in violation of 18 U.S.C. 1001 (Counts 8 and 9).[3] Petitioner Roswitha Gregg entered a conditional plea of nolo contendere to two counts of income tax evasion, in violation of 26 U.S.C. 7206(1) (Counts 10 and 11). Werner Gregg was sentenced to an aggregate term of three years' imprisonment, followed by a five-year term of probation. He was also ordered to pay fines totaling $200,000. Roswitha Gregg was sentenced to three years' imprisonment with all but six months suspended, followed by a three-year term of probation. She was also ordered to pay fines totaling $4000. The court of appeals affirmed (Pet. App. A1-A2).

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[1] Count 1 charged petitioners with exporting night vision goggles usable for military purposes to the Republic of South Africa. Count 2 charged the unlawful export of 16 military aircraft communication radios to a private company in West Germany. Count 3 involved the sale of component parts of a TOW missile system. Count 4 alleged that petitioners had attempted to export a TACAN air-to-air guidance system. Pet. App. A2-A3 n.4.

[2] Count 7 charged an attempt to export a Laser Inertial Navigation System to Japan without a Commerce Department license (Pet. App. A3 n.4).

[3] Werner Gregg was acquitted of one count of exporting items on the United States Munitions List, one count charging a violation of the Export Administration Act, and four counts of income tax evasion (Pet. App. A2-A3 nn. 1, 4).

1. Petitioner Werner Gregg founded, and both petitioners operated, a company called Gregg International. In September 1982, the Federal Bureau of Investigation (FBI) received information from a former employee of Gregg International that Werner Gregg had exported a TOW missile system to the Republic of South Africa without the license required by federal law. The FBI passed that information on to agents of the United States Customs Service, which began an investigation of petitioners and their business.

In February 1984, a Customs Service agent arranged to pay a fee to employees of the company that collected trash from petitioners' home and business if the employees would turn the trash over to Customs agents. Under the terms of the arrangement, Customs agents would determine when petitioners had placed their trash out for collection. An agent then would meet the trash hauler and provide special bags for petitioners' trash. The trash collector would pick up petitioners' trash, place it in the special bags, and turn it over to the Customs agents at a point removed from petitioners' home or business. Pet. App. A23-A24.[4] The Customs agents did not obtain a warrant to search the trash (*id.* at A24).

In the trash, government agents found telex messages between Gregg International and its customers. Based on the telexes, Customs agents obtained a warrant authorizing the interception of all telex communications to and from Gregg International for a period of 30 days. That authorization was later extended for three additional

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[4] At both petitioners' residence and their business, the trash was placed in plastic bags, which in turn were placed in plastic receptacles. At petitioners' home the trash was left at the curb. At petitioners' business, the trash was left 25 to 35 feet from the street. (Pet. App. A24).

30-day periods. Pursuant to the telex warrants, the government monitored all telex traffic to and from Gregg International between March 19, 1984, and June 30, 1984. Pet. App. A26-A27.

Based in part on the information obtained from the telex interceptions and the search of petitioners' trash, Customs agents obtained a warrant authorizing the search of petitioners' residence and business for documents relating to violations of various federal export control laws and regulations. On September 13, 1984, Customs agents, assisted by local police officers, executed the warrant and seized business records, telexes, and other documents from petitioners' home and business premises. Pet. App. A39-A40.

2. Before trial, petitioners filed a joint motion to suppress the evidence against them, including the evidence obtained from their trash, from the interception of telexes, and from the September 13 search of their residence. The district court held an evidentiary hearing and denied the motion in full. The court held that petitioners had no reasonable expectation of privacy in their trash and that the warrantless trash search therefore did not violate the Fourth Amendment (Pet. App. A23-A26). The court also rejected petitioners' contentions that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 801, 82 Stat. 211, applied to government interception of telex messages (Pet. App. A26-A31), and that there was insufficient probable cause to seize all the telex messages to and from petitioners' business (*id.* at A33).[5] In upholding the warrant authorizing telex in-

[5] The district court also held that the telex interception did not violate 47 U.S.C. 605 and that the warrant authorizing the interception complied with Fed. R. Crim. P. 41 (Pet. App. A31-A34). Petitioners have not challenged those holdings in this Court.

terceptions, the district court specifically found that "probable cause existed to believe that [petitioners'] business was permeated with criminal activity" (*id.* at A35). Finally, the district court upheld the warrant authorizing the September 13 search of petitioners' home and business (*id.* at A39-A40).[6] Again, in upholding the warrant and search the court noted "the suspected breadth of the business's criminal activity," and it found that "[t]he search was conducted in an orderly manner with the intrusion minimized by the agents to the greatest extent possible" (*id.* at A40).

The district court granted Roswitha Gregg's motion to sever her trial from her husband's. At Werner Gregg's trial, the government introduced evidence to show that the items that petitioners exported or attempted to export were subject to the licensing requirements contained in 22 U.S.C. 2778 and 50 U.S.C. App. 2410. The government also introduced evidence showing that Werner Gregg had substantial expertise in the area of restricted, licensed exports. Pet. App. A10.

Gregg did not dispute that he had exported or attempted to export the items charged. Instead, he attempted to show that the items at issue were not subject to the State and Commerce Department licensing schemes that he was charged with violating. To that end, Gregg sought to introduce expert testimony that the items at issue were not in fact subject to those requirements. In addition, in an attempt to demonstrate that he lacked the specific intent required by the pertinent statutes, Gregg sought to introduce into evidence the federal statutes and regulations that

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[6] The court also rejected several other challenges to the government's evidence, including petitioners' claims that statements made by both petitioners were inadmissible and that Customs agents had improperly searched Werner Gregg's luggage as he was leaving the country (Pet. App. A36-A38, A40-A41).

create and define the licensing requirements and list the items that are subject to licensing. The district court refused to admit either the proffered testimony or the regulations. Pet. App. A10-A11.

Following Werner Gregg's conviction, Roswitha Gregg agreed to enter a conditional plea of nolo contendere to two counts of income tax evasion (Pet. App. A2 n.1). In return, the government agreed to dismiss the remaining counts against her, to make no recommendation as to sentence, and to urge the district court to allow Mrs. Gregg to remain free on bail pending appeal. In accordance with Fed. R. Crim. P. 11(a)(2), the agreement allowed Mrs. Gregg to appeal the denial of the motion to suppress.

3. The court of appeals affirmed petitioners' convictions (Pet. App. A1-A21). The court agreed with the district court that petitioners did not have a reasonable expectation of privacy in their trash and that Title III did not apply to telex transmissions (*id.* at A2-A5). In addition, the court of appeals rejected Werner Gregg's contention that the district court erred by refusing to allow Gregg's counsel to introduce into evidence the statutes and regulations defining the offenses charged in the indictment (*id.* at A10-A11). Finally, the court affirmed the district court's decision to disallow the expert testimony proffered by Gregg concerning the reach of the statutes (*id.* at A14-A15).[7]

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[7] The court of appeals also rejected Werner Gregg's contentions that the statutes at issue are unconstitutionally vague and that evidentiary rulings by the district court during his trial were erroneous (Pet. App. A11-A12). These claims are not renewed in this Court.

ARGUMENT

1. Petitioners contend that the warrantless search of their trash violated the Fourth Amendment (Pet. 22). The searches of petitioners' trash closely resemble the trash searches that are at issue in *California* v. *Greenwood,* No. 86-684 (argued Jan. 11, 1988). In both cases, a law enforcement officer informally asked a trash hauler to turn refuse collected at the defendant's curbside over to the officer. In both cases, information obtained in that manner was used to obtain warrants for other searches. See *People* v. *Greenwood,* 182 Cal. App. 3d 729, 732-733, 227 Cal. Rptr. 539, 542-543 (1986). The validity of the search of petitioners' trash is likely to depend on the resolution of *Greenwood.* This petition therefore should be held pending the decision in that case.

2. Petitioners contend that the the warrants authorizing the interception of the telex traffic, the search of their home and business, and the seizure of their business records were invalid. The rejection of this contention by the courts below, however, is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review of petitioners' Fourth Amendment claim is unwarranted.

a. First, petitioners maintain (Pet. 11-14) that the warrants authorizing the interception of the telex messages were insufficiently particularized. They argue that Title III embodies the standards to be applied to the issuance and execution of such warrants.[8] Thus, they claim that the

[8] Petitioners have abandoned their claim, rejected by both courts below, that the version of Title III that was applicable at the time of the interceptions in this case directly governed the interception of telex messages (see Pet. 12-14 & nn.11 & 13). In 1986, after the searches in this case, Title III was amended so that it now reaches telex communications. See Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(a)(3), 100 Stat. 1848.

magistrate issuing the warrant was required to find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous" (18 U.S.C. 2518(3)(c)), that the agents executing the warrant should have made efforts to minimize the interception of legitimate telex messages (18 U.S.C. 2518(5)), and that the warrant must contain a "particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates" (18 U.S.C. 2518(4)(c)).

First, contrary to petitioners' assertion, the warrant substantially complied with the pertinent requirements of Title III. The warrant contained a description of the communications to be intercepted and the particular offenses to which those communications related. Second, there was nothing that government agents could do to lessen the interception of legitimate telex messages in the circumstances of this case. All of the telexes intercepted were to and from petitioners' business, Gregg International (Pet. App. A27). Thus, each had to be examined to determine if it related to criminal transactions, which the district court found to be a substantial part of petitioners' business (*id.* at A35). In addition, the warrant tracked the requirement of 18 U.S.C. 2518(5) by providing that the interceptions could not last more than 30 days unless the warrant was renewed (Pet. App. A26). There is therefore no merit to petitioners' assertion that the warrant was insufficiently particularized.

Petitioners contend, however, that the decision of the court of appeals conflicts with those of other courts of appeals, which have mandated strict compliance with the requirements of Title III in cases involving television surveillance, to which the former version of Title III also

did not expressly apply. Pet. 12-14 (citing *United States* v. *Torres*, 751 F.2d 875 (7th Cir. 1984), cert. denied, 470 U.S. 1087 (1985); *United States* v. *Biasucci*, 786 F.2d 504 (2d Cir. 1986), cert. denied, No. 85-2108 (Oct. 6, 1986); *United States* v. *Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987)). These cases are readily distinguishable. In each, the court relied on the extremely intrusive character of secret television surveillance to hold that Title III embodied the minimum requirements of the Fourth Amendment's particularity clause. These courts reasoned that television is significantly more intrusive than other forms of electronic surveillance because it indiscriminately records everything its subjects do.

By contrast, the interception of telex messages is much less intrusive than a telephone or other wiretap that would be subject to Title III. Telex messages are rarely used for personal as opposed to business communications, and their interception does not indiscriminately record everything a person does or says. Instead, the interception of telex transmission intrudes on only a narrow range of activity. For these reasons, the warrant issued in this case satisfies the particularity requirement of the Fourth Amendment, and the failure to comply with some aspect of Title III does not, ipso facto, constitute a violation of the Constitution.[9]

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[9] Petitioners also contend (Pet. 10-12) that the decision of the court of appeals upholding the interception of the telexes conflicts with this Court's decisions in *Osborn* v. *United States*, 385 U.S. 323 (1966); *Berger* v. *New York*, 388 U.S. 41 (1967); and *Katz* v. *United States*, 389 U.S. 347 (1967). There is no merit whatever to this contention; the claimed "conflict" is nothing more than a restatement of petitioners' claim that the warrant authorizing the interception was insufficiently particular.

b. Petitioners next contend (Pet. 14-18) that the warrants authorizing the interception of the telexes and the search of their home and business were overbroad in that they allowed the executing officers to seize all telexes to and from petitioners' business and thousands of documents from their home and business premises. For this reason, petitioners claim, the decision of the court of appeals upholding the warrants is contrary to *Marron* v. *United States,* 275 U.S. 192 (1927), and other decisions of this Court holding that the Constitution forbids "general warrants."

As explained above, the warrant authorizing interception of the telexes was not overbroad and did not result in an "overseizure." Because of the nature of telex technology and the fact that so much of petitioners' business was suspect, the Customs agents had to examine each telex to or from Gregg International in order to determine whether the telexes related to the illegal activity for which the agents had developed probable cause. It is well established that, as in this case, a warrant may describe a broad category of documents if a more precise description of the items to be seized is not possible. See *Williams* v. *Kunze,* 806 F.2d 594, 598 (5th Cir. 1986); *United States* v. *Gomez-Soto,* 723 F.2d 649, 654 (9th Cir.), cert. denied, 466 U.S. 977 (1984).

Nor was the warrant authorizing the search of petitioners' home and businesss and the seizure of documents found there overbroad. Contrary to petitioners' assertion, the warrant did not allow the seizure of " 'all' business documents of Gregg International" (Pet. 16). Rather, the warrant was limited to "documents that consist of sales, invoices, shipping papers, purchase orders, correspondence, payment records, and telexes relating to the purchase, sale, storage, transportation and financing of merchandise exported or to be exported from the United

States" in violation of several Export Administration Regulations, federal statutes, and an executive order (Pet. App. A40 n.8). That description adequately channeled the discretion of the officers executing the warrant and prevented the search from being overbroad. See *Andresen* v. *Maryland,* 427 U.S. 463, 480-482 (1976); *United States* v. *Sawyer,* 799 F.2d 1494, 1508 (11th Cir. 1986), cert. denied, No. 86-6012 (Jan. 27, 1987). A warrant does not have to specify the precise documents to be seized in order to satisfy the Fourth Amendment. See *United States* v. *Vanichromanee,* 742 F.2d 340, 347 (7th Cir. 1984).

The reason why the warrant in this case authorized such an extensive seizure was not that the warrant was overbroad; rather, it was that petitioners' illegal activities were extensive (see Pet. App. A35, A40). As this Court said in *Andresen,* 427 U.S. at 481 n.10, "[t]he complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession." The decision of the court of appeals upholding this warrant therefore does not conflict with this Court's decision in *Marron.*

c. Petitioners also raise two other related contentions concerning the breadth of the search of their business. First, they claim that the courts of appeals are divided over the question whether a finding that a business is "permeated with illegal activity" can justify an "overseizure beyond the scope of the warrant" (Pet. 18). Second, petitioners claim that the type of relief that should be granted for such "overseizures" is a question that should be addressed by this Court (Pet. 21).

The short answer to these contentions is that neither court below found that there has been any such "overseizure." Nor, as discussed above, is there any basis for

this Court to grant certiorari and determine (contrary to the holdings below) that any warrant in this case was "overly broad on its face" (Pet. 21). Thus, there is no reason in this case for this Court to address the consequences of overbroad searches or overbroad warrants.

3. Petitioner Werner Gregg contends that the district court erred by refusing to allow him to introduce into evidence the federal statutes and regulations under which he was convicted and by excluding the testimony of three expert witnesses who were to testify about the meaning of those statutes (Pet. 22-24). Neither contention is meritorious.

Petitioner argues that the length and complexity of the Arms Export Control Act, the Export Administration Act of 1979, and the regulations promulgated under both statutes are relevant to the question whether he had the specific intent to violate the law. He claims that he should have been allowed to put these statutes and regulations before the jury as evidence that he did not deliberately violate the law, presumably because the law in question was too complex to understand or master.

The district court instructed the jury that the government had to prove beyond a reasonable doubt that Werner Gregg "acted knowingly and willfully, and with specific intent, and particular knowledge" (Pet. App. A10). Petitioner did not challenge this instruction. Nor does petitioner claim that there was insufficient evidence to show that he had the requisite specific intent. Indeed, the evidence at trial showed that Werner Gregg possessed considerable expertise on the statutory scheme at issue (*ibid.*).

Moreover, it is ordinarily not the province of the jury to interpret the law, and statutes are not usually admitted into evidence. The introduction of legal material is likely to confuse the jury without shedding light on the factual issue it has to decide—in this instance, whether petitioner

specifically intended to export controlled items without the requisite licenses. For these reasons, the district court did not abuse its discretion by excluding the statutory material. See *United States* v. *Bernhardt,* 642 F.2d 251, 253 (8th Cir. 1981); *Cooley* v. *United States,* 501 F.2d 1249, 1253-1254 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975).

The district court also did not abuse its discretion by refusing to admit testimony by three defense experts regarding the meaning of the statutes and regulations under which Werner Gregg was convicted. Two of the expert witnesses were to testify that the items that Gregg was charged with exporting in Counts 1, 2, and 4 fell into the "normal commercial use" exception of the United States Munitions List. See 22 C.F.R. 121.1, Category XII(c). The third witness was to testify about whether the TACAN air-to-air guidance system that was the subject of Count 4 was on the Munitions List. A secondary purpose of the testimony of all three witnesses apparently was to show that the question whether export of these items was proscribed was sufficiently unclear that Gregg could not have intended to violate the law.

The court of appeals found as a matter of law that the items that formed the basis for Counts 1, 2, and 4 were on the Munitions List and were not subject to the "normal commercial use" exception to Category XII of the list (Pet. App. A12-A14). In addition, the court held that the exclusion of testimony regarding the TACAN system did not prejudice petitioner because "[t]he testimony excluded would not have established any legitimate defense under the circumstances of the case at bar" (Pet. App. A15).

The court of appeals' conclusion is clearly correct. Count 1 charged the export of night vision goggles, items that fall within Category XII of the Munitions List. That category includes "night sighting and night viewing equip-

ment." See 22 C.F.R. 121.1, Category XII(a). Although subsection (c) of Category XII contains an exception for items in "normal commercial use," that subsection by its terms applies only to "[c]omponents, parts, accessories, attachments, and associated equipment specifically designed or modified for the articles in paragraphs (a) and (b)," which contain the items subject to licensing. Subsection (c) is not a free-standing category that provides an exception for any item found in subsections (a) or (b) that happens to be in normal commercial use.

Similarly, Counts 2 and 4 charged the export of items that fell into Category XI of the Munitions List, which governs the export of "electronic equipment * * * for military application" (see Pet. App. A13 n.15). Thus, because as a matter of law the expert testimony that petitioner sought to elicit was incorrect, the district court properly excluded it.

CONCLUSION

With respect to the question presented concerning the search of petitioners' trash, the petition for a writ of certiorari should be held pending the resolution of *California* v. *Greenwood, supra*. In all other respects the petition should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

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